KONG WAH HOUSING DEVELOPMENT SDN. BHD.

v.

DESPLAN CONSTRUCTION TRADING SDN. BHD.

HIGH COURT MALAYA, IPOH
ABDUL MALEK AHMAD J
[CIVIL SUIT NO. 22-6-91]
25 FEBRUARY 1991

CONTRACT: *Building contract - Arbitration clause - Slow progress in works - Termination - Injunction - Specified works - Impossible for Court to supervise building contract - Implied term - Surrender of site to owner - Remedy - Arbitration agreement - Jurisdiction of Court.*

On 1 August 1990, the plaintiff KW had entered into an agreement with the defendant D for the construction of various buildings on the property TS for a sum of approximately RM4.2 million and on 15 May 1990, exclusive possession of the site was given to D. Clause 25(1) the agreement contained provisions as to the consequences if D defaulted in relation to suspension of the works or failure to proceed diligently with the work and clause 34(1) specified that any dispute arising between the employer and the architect and/or the contractor in relation to certain clauses, including clause 25, shall be referred to arbitration; in the event that the parties cannot agree to an arbitrator, either party could apply to the vice president of Pertubuhan Akitek Malaysia, PAM, to appoint an arbitrator and such arbitrator shall hear the proceedings pursuant to the Arbitration Act 1952 (the Act).

The architect had on 17 December 1990 written to D in relation to the slow progress of the works and had given notice of KW's right to determine the contract if the slowness persisted. By letter dated 7 January 1991, KW terminated D's services and on 19 January 1991, KW were granted an injunction preventing D from entering into TS or interfering with KW's endeavours in developing the said property. D's application to strike out the suit or set aside the injunction was dismissed but the Court decided that the suit should be stayed pending arbitration.

D appeals on the ground that the injunction had been obtained before the matter had been resolved and that the injunction should be stayed since it was not the proper remedy as the matter should firstly go to arbitration.

KW agreed that the suit should be stayed pending arbitration but contended that there was no reason for the suit to be struck out or for the injunction to be stayed pending completion of arbitration.

Held:

[1] On the facts here namely, the amount of work completed by D, the position of KW as a housing development company and the existence of third parties, that is, the house purchasers, if D was allowed to continue, it might lead to a stalemate and an ultimate abandonment of the housing scheme. It was not for the Court to supervise a building contract or to compel an owner to reemploy a slow contractor who has his own remedy in damages.

[2] As an arbitration agreement does not oust the jurisdiction of the Courts, the Court exercised its discretion in favour of KW by dismissing D's application for striking out of the action and for setting aside or staying of the injunction and allowed the stay of the action until the matter is determined by arbitration.

[Order accordingly.]

Cases referred to:
Mayfield Holdings Limited v. Moana Reef Limited [1973] 1 NZLR 309
The Mayor, Aldermen and Burgesses of the London Borough of Hounslow v. Twickenham Garden Developments Ltd. [1970] Ch D 7 BLR 89

Other source referred to:
Hudson's Building and Engineering Contracts 10th Edn., p. 712

For the plaintiff - Chew Gi Boo; M/s. Amin-Tan & Co.
For the defendant - Vijaya Segaran; M/s. Maxwell Kenion Cowdy & Jones

JUDGMENT

Abdul Malek Ahmad J:

On 19 January 1991 I had granted the plaintiff, upon an undertaking for damages, an order in terms of their application filed one day earlier on a certificate of urgency restraining the defendant, their directors, servants, agents or otherwise from entering and/or remaining and/or occupying and/or trespassing on the plaintiff's property known as Taman Sinaran Lot Nos. 848, 690 and 729 Mukim Grik, Daerah Ulu Kinta, Perak until further order and from obstructing and/or disrupting in whatsoever way the plaintiff's endeavours in developing the said property. By an urgent summons-in-chambers filed on 25 January 1991, the defendant had applied to strike out the suit or alternatively to stay the suit and injunction until the application was heard, and to set aside the injunction with damages for the defendant to be assessed by the learned Senior Assistant Registrar, and after hearing arguments on 28 and 31 January 1991, I had decided on 2 February 1991 that the suit, and the order given on 19 January 1991, should remain but that the suit should be stayed pending arbitration. Hence this appeal by the defendant.

It is not disputed that the parties had entered into an agreement on 1 August 1990 where the defendant had been engaged by the plaintiff to build 172 double storeyed shop houses, low cost houses and semi-detached houses on the property known as Taman Sinaran for a sum of RM4,260,499. Exclusive possession of the site had been given to the defendant on 15 May 1990.

It is relevant to reproduce, for ease of reference, clauses 25(1) and 34(1) of the agreement at this juncture:

> 25(1) If the contractor shall make default in any one or more of the following respects, that is to say:
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> (a) if he without reasonable cause wholly suspends the carrying out of the works before completion thereof, or
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> (b) if he fails to proceed regularly and diligently with the works, or
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> (c) if he refuses or persistently neglects to comply with a written notice from the architect requiring him to remove defective work or improper materials or goods and by such refusal or neglect the works are materially affected, or
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> (d) if he fails to comply with the provision of clause 17 of these conditions,
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> then the architect may give him a notice by registered post or recorded delivery specifying the default, and if the contractor either shall continue such default for fourteen days after receipt of such notice or shall at any time thereafter repeat such default (whether previously repeated or not), then the employer without prejudice to any other rights or remedies, may within ten days after such continuance or repetition by notice by registered post or recorded delivery forthwith determine the employment of the contractor under this contract provided that such notice shall not be given unreasonably or vexatiously.

34(1) In the event that any dispute or difference should arise between the employer or architect on his behalf and the contractor, either during the progress or after the completion or abandonment of the works, as to any matter or thing of whatsoever nature arising thereunder or in connection therewith (including any matter or thing left by this contract to the discretion of the architect or the withholding by the architect of any certificate to which the contractor may claim to be entitled or the measurement and valuation mentioned in clause 30(5)(a) of these conditions or the rights and liabilities of the parties under clauses 25, 26, 31 or 32 of these conditions), then such disputes or differences shall be referred to arbitration.

Upon the disputes or differences having arisen any party may serve written notice on the other party that such disputes or differences shall be referred to an arbitrator to be agreed between the parties or failing agreement or absence of reply or reluctance to act by the other party then the party may, after the expiry of fourteen days from the date of the notice to concur on the appointment of an arbitrator, apply to the President or Vice President for the time being of Pertubuhan Akitek Malaysia to appoint an arbitrator and such arbitrator so appointed shall by virtue of this agreement be deemed to be appointed with the agreement and consent of the parties to the contract.

Upon appointment the arbitrator shall with despatch initiate the arbitration proceedings following the provisions of the Arbitration Act 1952 (Revised 1972). The hearing may be "*ex parte*" should either party, having been given due notice, fail to attend.

It is also not disputed that the architect on 17 December 1990 had written to the defendant as regards the "abnormally slow" progress and giving notice of the plaintiff's right to determine the contract if the slowness persisted. This had been followed by the termination letter from the plaintiff's solicitors to the defendant dated 7 January 1991. Learned Counsel for the defendant had in his submissions referred to the defendant's letter in response to the architect's letter stating that the plaintiff had never replied to it but reference to this letter would show that the gist of it is only the non-acceptance of the architect's letter although the defendant had admitted that they were two months behind schedule. Apart from this, there was also a further exchange of correspondence between the parties where the contents denote that discussions had been held to resolve the issues and that all disputes should be referred to arbitration.

Learned Counsel for the defendant had argued that the injunction had been obtained before the matter was cleared, that the plaintiff had not acted properly, that it was difficult to assess the actual work completed by the defendant at the time the injunction was obtained, that the removal of equipment could not be done overnight and that the injunction should be stayed since it was not the proper remedy as the matter should go for arbitration.

Learned Counsel for the plaintiff had conceded that the suit should be stayed pending the arbitration but saw no reason why it should be struck out or for the injunction to be stayed until the arbitration was completed. He also referred to two of the defendant's letters dated 24 December 1990 and 11 January 1991 where in essence the defendant had admitted the delay.

He had also referred me to two conflicting authorities which, although learned Counsel for the defendant had subsequently submitted were not relevant to the issue, I had found otherwise. In the earlier case of *The Mayor, Alderman and Burgesses of the London Borough of Hounslow v. Twickenham Garden Developments Ltd.* [1970] Chancery Division 7 BLR 89, Megarry J had decided as follows:

1. The contract being one for the execution of specified works on the site during a specified period which was still running, and conferring on each party specified rights on specified events to determine the employment of the contracts thereunder, it was an implied term of the contract that the council would not revoke the contractors' licence to enter upon the site (otherwise than in accordance with the contract) whilst that said period was still running.

2. Unless the employment of the contractors had been validly determined, the Court would not grant to the council an injunction to expel the contractors from the site because a Court of equity would not assist in the breaking of contractual obligations.

3. Although the council had established 'some sort of a case for having validly determined the contract' the evidence fell 'considerably short' of the standard upon which it would be safe to grant the injunctions sought on motion.

4. References in the contract to 'possession' by the contractors should be construed in the light of the fact that they appeared in a standard form intended to be used in a wide variety of circumstances. Whilst in some cases, the building owner might have manifest possession of the site, and might remain so, despite the building operations, in others, the building owner might leave the contractor in sole and undisputed control of the site. The contract necessarily required the building owner to give the contractor such possession, occupation or use as was necessary to enable him to perform the contract, but whether in any given case the contractor in law had possession must, depend 'at least as much upon what is done as upon what the contract provides.'

5 The principles of natural justice had no application to an architect's notice issued pursuant to clause 25. Under a RIBA contract the architect was required to 'retain his independence' in exercising his skilled professional judgment in the discharge of the various functions required of him but provided that he did this, he was not required to go further and observe the rules of natural justice (that is giving due notice of all complaints and affording both parties a hearing).

6 a notice of default by the architect under clause 25(1) was required to do no more than direct the contractor's mind to one or more of the four categories of default set out in sub-paragraphs (a) to (d). The architect was not required in that notice accurately to particularise the various facts and/or matters alleged to constitute the default.

After careful consideration, I was inclined to agree with learned Counsel for the plaintiff that the facts in that case were distinguishable from the present case as regards the amount of works completed by the contractor, as regards the status of the plaintiff namely a local authority with no vested interest there and a housing development company here, and as regards the existence of third parties here namely the house purchasers while no third party was involved in the English case. Consequently, as stated by learned Counsel, if the contractor was allowed to stay and continue here, it certainly might lead to a possible stalemate and an ultimate abandonment of the housing scheme.

As my view was that the owner could not be compelled to reemploy a slow contractor who has his own remedy in damages and that it is virtually impossible for the Court to supervise such a building contract, my opinion was that the injunction should be sustained. I was therefore in full agreement with what Mahon J stated in *Mayfield Holdings Limited v. Moana Reef Limited* [1973] 1 NZLR 309 namely:

The proposed implication of a term in a contract, in particular a commercial contract, calls for careful consideration. A Court is not entitled to reconstruct an agreement on equitable principles, or on a view on what the parties should have contemplated. The implication of the unexpressed term must be necessary to give to the transaction such business efficacy as the parties must have intended. With these observations in mind, what would be the presumed common intention of the parties to an ordinary building contract in the event of the development between them of a dispute amounting to an impasse relating to the constructions of the works? The consequence of the impasse have to be considered. The works have been part completed, and the owner claims to be entitled to determine the contract for reasons of faulty workmanship, deviation form plans, slow progress, or the like. The owner stops progress payments and instructs his architect not to certify for further work. In theory the contractor can complete the next section of the work and bring an action, with its consequential

> delays, for the progress payment due in respect of that work, raising default by the owner as an answer to the defence that there is no architect's certificate. But in practice, the delay involved would be insurmountable. The contractor would have to lay off his employees, or transfer them to another job. In the absence of progress payments he probably could not pay his sub-contractors. The architect's authority to co-operate in the construction would be withdrawn. Under these circumstances it seems impossible to say that the contractor can obtain any benefit by remaining on the job. He has a claim for unpaid work to date, and a claim for loss of profit on the whole of the contract, and instead of working on under difficulties, and suing for unpaid progress payments, he surely would take the alternative course of leaving the job and suing to enforce his claims, thus recovering by action, if not in default under the contract, the monies to which he would have been entitled if the works had been completed by him pursuant to the contract. The contractor's only interest in the transaction is to complete the specified works at a profit to himself. The owner's interest is to secure completion in accordance with his plans and specifications. Each object will still be attained even if the owner, in breach of his contract, procures the dismissal of the contractor from the site and completes the specified works by contract with another builder. Judged from the standpoint of business efficacy, I can for myself see no difficulty in implying a term between the builder and the owner that in the event of a complete breakdown in their contractual relationship, the builder will surrender the site and the works, leave the owner to complete as and when he will, and enforce by action his remedy against the owner breach of the building contract.

Mahon J had also referred to p. 712 of *Hudson's Building and Engineering Contracts* 10th Edn. which states:

> No injunction will ordinarily be granted to restrain the exercise of the powers given by a forfeiture clause for the contractor can be amply compensated in damages if the forfeiture is wrongful, whereas if the contractor were allowed to continue the work, the Court could not specifically enforce the contract, nor compel the due completion of his obligations.

On these facts, and as it is trite law that an arbitration agreement does not oust the jurisdiction of the Courts but the Court is given the discretion on the application by the disputing party whether or not to stay any action filed in respect of a dispute covered by an arbitration agreement, I had accordingly dismissed the defendant's application at prayer (a) to strike out the action and prayers (c) and (d) to set aside the injunction and for damages to be assessed. As for prayer (b), I had allowed the stay of the action until the matter is determined by arbitration but had disallowed any stay of the injunction for the reasons stated earlier. In the circumstances, I had ordered that costs are to be in the cause.

I had also refused the defendant's application for further arguments in open Court and for a stay of execution pending the appeal as the grant of the order for the second post decision application would be tantamount to going against my decision on the main application.

Also found at [1991] 2 CLJ 1177